

American Bar Association

House of Delegates

**Remarks of Chief Justice Margaret H. Marshall
President of the Conference of Chief Justices**

February 16, 2009

Thank you, William, for that introduction. And thank you for your sage leadership of the House of Delegates, and for the important policies you have guided to fruition. And thank you, President Wells, for your invitation to be here today. Welcome to Boston.

Sixty years ago prominent members of the American Bar Association, including former United States Supreme Court Justice Tom Clark, began to examine seriously the delivery of justice in our state courts. The result? The founding of the Conference of Chief Justices.¹ Today we come full circle. I stand before you as the President of the Conference, the first President to address this House of Delegates in that capacity. A few weeks ago, President Wells joined the Chief Justices at our midyear meeting in Arizona where he delivered a most eloquent address. Our organizations are longstanding partners. Our memberships overlap. And now the time is right for more formal, more consistent contact at the highest levels between the ABA, the preeminent voice of the nation's lawyers, and the Conference of Chief Justices, the preeminent voice of state judiciaries. My address here today, and President Wells's address to the Conference of Chief Justices last month, mark a new era of more robust collaboration.

Why this partnership? And why now? Because "the health of the entire legal system – both state and federal – depends on a strong state judiciary."² These are not my words, but the words of former Justice Sandra Day O'Connor, herself a state appellate justice before her appointment to the United States Supreme Court. As justice in our state courts goes, so goes justice in our nation.

Sheer numbers tell the story, at least in part. These are the statistics for 2007, the latest date for which comparative data are available. The total number of cases filed in federal district and appellate courts, not including bankruptcy cases, was 384,330. In state courts? 47.3 million cases, not including traffic offenses.³ It is conventionally estimated that each year at least 95 per cent of all litigation in the United States takes place in state

¹ See, e.g., Judith Resnik, Joshua Civin, & Joseph Frueh Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAS), 50 Ariz. L. Rev. 709, 753-754 (2008); John P. Frank, Justice Tom Clark and Judicial Administration, 46 Tex. L. Rev. 5, 9-10 (1967).

² Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* 142 (New York: Random House 2004).

³ Federal figures are from the Administrative Office of the United States Courts ; state court figures are from the National Center for State Courts. Memoranda on file.

courts.⁴

The vast majority of civil and criminal cases heard in state courts make no headlines. And of course it is federal law that unites our country under a set of common principles. But state courts are closer to the pulse of everyday life. Where do the legal meanings of such elemental concepts as "birth" and "death" and "family" take shape? Largely in state courts. State courts decide whether the tenant must vacate, whether the criminal defendant was properly charged, who gets custody of children, who complies with zoning laws, whether the worker is entitled to compensation or an injured patient to recover from her doctor. Shifting legal and social paradigms find voice in state court decisions.

I need hardly emphasize to this audience that, for state courts to meet their obligation to do justice in the dizzying array of matters that come before them, they must operate fairly and equitably. They must be independent of outside influence, be it popular prejudice or interference from the elected branches. As someone who grew up in a South Africa riven by apartheid, I know in my bones the central importance of an impartial judiciary to the rule of law, for I have seen its antithesis. In the South Africa of my youth, courts were the handmaidens of Parliament. Judges were powerless to strike down even the most unjust laws, so long as those laws were duly enacted. Justice was not blind. It was a stacked deck. Today South Africa is a constitutional democracy, with a new Constitutional Court of growing influence.

For two centuries and more we in the United States have benefitted from an independent judiciary. But we should never take that for granted. In fact, I shall be blunt: Our state courts are in crisis. A perfect storm of circumstances threatens much that we know, or think we know, about our American system of justice.

Time permits me only the briefest summary of three most troubling recent developments for state courts: inadequate funding, an inability to provide adequate access for all, and the politicization of state judiciaries.

First, funding. These are lean times for the public sector. No fewer than 46 states are facing or will face severe revenue shortfalls in their current and next fiscal year budgets, with revenue gaps for this fiscal year and into 2011 predicted to total some \$350 billion.⁵ Public entities must make painful choices. From my conversations with

⁴ See, e.g., Ellen A. Peters, Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System, 73 N.Y.U. L. Rev. 1065, 1069 (1998) (examining historic role of state courts in federal system).

⁵ Elizabeth McNichol and Iris J. Lav, State Budget Troubles Worsen, Center on Budget and Policy

state court chief justices across this nation, I know that state courts are willing to bear their fair share of budget cuts. Yet many state courts are being asked to do more. Our budgets are being decimated, even as we know that in times of economic stress, people turn in even greater numbers to their state courts for relief.

Consider this: New Hampshire's Judicial Branch recently announced that it will halt all civil and criminal jury trials for a month to save on per diem payments to jurors; seven of that state's 59 judgeships will remain vacant through the end of the fiscal year.⁶ Two rounds of budget cuts in Florida have left 280 court personnel without jobs, and more cuts may be on the way⁷. Utah has dismissed all of its in-house court reporters.⁸ Even the security of our courthouses is at risk. Maine is no longer staffing magnetometers as people enter the courthouse.⁹

This audience, perhaps more than any other, knows that it matters, it really matters, whether a case moves expeditiously through the court system. It matters to the business damaged by theft of its intellectual property. Or the crime victim seeking justice. Or the injured worker with mounting medical bills. It matters to lawyers trying to manage their caseloads. And, ultimately, it matters to the public's perception of its government.

There is a funding level below which state courts will be unable to function at even minimally adequate levels. Are we approaching that precipice?

A second, and related, challenge for state courts is access to justice. "Freedom and equality of justice are essential to a democracy," said Reginald Heber Smith in his landmark work on the law and the poor almost a

Priorities, at <http://www.cbpp.org/9-8-08sfp.htm> (updated Feb. 10, 2009).

⁶ Bob Drogin, Even jury hiring is frozen, Los Angeles Times, Dec. 22, 2008, at <http://www.latimes.com/news/nationworld/nation/la-na-courts22-2008dec22,0,387609.story>.

⁷ *Id.*

⁸ National Center for State Courts, Budget Resource Center, at <http://www.ncsconline.org/wc/budget/activities/utah.asp> (last visited Feb. 9, 2009).

⁹ Elizabeth Stawicki, Minnesota Public Radio, Minnesota's court budget woes are part of nationwide trend (broadcast Dec. 30, 2008), available at <http://minnesota.publicradio.org/display/web/2008/12/29/national-court-budget-woes/> (on file).

century ago. "[D]enial of justice," he continued, "is the short cut to anarchy."¹⁰ These are words that resonate deeply with me.

The principle of equal justice, as Smith well knew, finds its most palpable expression in our state courts. There, our most vulnerable citizens come to seek access to their most basic needs -- food, shelter, healthcare, physical safety. Many have no attorney, and neither legal services nor pro bono assistance can help all in need. Many have limited English proficiency or are functionally illiterate, yet competent translators and simplified forms can be hard to find. Rural residents must travel long distances to seek a domestic violence restraining order. The disabled are confronted by ancient courthouses with steep stairways and narrow corridors. Such circumstances are intolerable in a society founded on the principle of equal justice, and they are all too common in our state courts.

Both the Conference of Chief Justices and the American Bar Association have called, in the strongest of terms, for more and better resources to be directed to the administration of justice in our state courts. In the balance hangs the fate of our justice system.

The decimation of state court budgets. Lack of access to justice. Now the third danger facing state courts, perhaps the most toxic element of all: the politicization of state judiciaries.

Unprecedented amounts of special interest money now line judicial campaign coffers. Vicious and misleading judicial electioneering floods the media. And a decision of the United States Supreme Court, *Republican Party of Minnesota v. White*,¹¹ loosened restrictions on judicial campaign speech and opened a Pandora's box of difficult issues. It was once unthinkable for any judicial candidate to pledge to rule a certain way in a certain class of cases. After *White*, that reticence may be disappearing.

This trio of developments – special interest money, attack ads, the loosening of ethical strictures on judicial campaign speech – has transformed the nature of judicial elections. What were once low-key, inexpensive contests for a seat on the judiciary have become multi-million-dollar scorched earth campaigns. When judges have to look over their shoulders before deciding a case –or worse, when they make an implied promise to look over their shoulder before deciding a case – when litigants enter the courtroom hoping their attorney has contributed enough to

¹⁰ National Legal Aid & Defender Ass'n Collected Quotes Pertaining to Equal Justice, at http://www.nlada.org/News/Equal_Justice_Quotes.

¹¹ *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

a judge's election coffers, we are in trouble, deep trouble. The threat is set out comprehensively this Association's 2003 publication *Justice in Jeopardy*, a report of the Commission on the 21st Century Judiciary, on which I was honored to serve, and which I commend to your attention. More recently, in an address to the Conference of Chief Justices last month, Justice Sandra Day O'Connor had this to say: "While our judiciary has always faced significant attacks, some appropriate and others not, the single greatest threat to judicial independence is fairly modern and uniquely American. And that is the flood of money coming into our courtrooms by way of increasingly expensive and volatile judicial elections." Strong words from one of our country's most admired figures.

This term, in *Caperton v. Massey*,¹² the United States Supreme Court will again have the opportunity to consider matters implicating state judicial elections. The central issue raised in that case is the applicability of the Due Process Clause to motions to disqualify based on judicial election campaign financial support. Both the American Bar Association and the Conference of Chief Justices have submitted amicus briefs in the case. The ABA has urged the Court to recognize that "increased judicial campaign contributions pose a greater threat than ever to public confidence in the integrity of the judiciary."

The institutional support of the ABA is critical to defending the role of state courts in our system of justice. You are our staunchest ally, and for that we are most grateful. I know I speak on behalf of all my colleagues who are aware of, and deeply appreciate, the countless initiatives undertaken by state and local bar associations to support state courts. And I know that the chief justices look forward to the meeting of the ABA Presidential Commission on Fair and Impartial State Courts in May that will underscore the importance of inter-branch cooperation needed to fortify the independence of state courts.

Today I ask each of you to continue your individual support, as lawyers and as citizens, for state judiciaries across this great nation. You are the leaders of America's bar, and you are perfectly positioned to make a difference. Speak up when your state courts are underfunded or its judges unfairly attacked. Know what is happening within your state court systems. Volunteer for state court committees and working groups. Advocate before your state's Legislatures and Governors for adequate court funding and for merit-based judicial selection. Educate your communities.

I turn again to Justice O'Connor. "Lawyers possess the keys to justice under a rule of law, the keys that

¹² *Caperton v. A.T. Massey Coal Co.*, No. 08-22, cert. granted Nov. 14, 2008.

open the courtroom door."¹³ In our adversary system, the advancement of justice, and its speedy delivery, depend equally on the commitment of lawyers and of judges. Imagine how much we can do by working together.

On behalf of myself and of future Presidents of the Conference of Chief Justices, I look forward to *that* campaign. Thank you.

¹³ Sandra Day O'Connor, Professionalism, 78 Or. L. Rev. 385, 390 (1999).